

1 ADAM BRAVERMAN
United States Attorney
2 DIANNE M. SCHWEINER
Assistant U.S. Attorney
3 Cal. State Bar No. 188013
Office of the U.S. Attorney
4 880 Front Street, Room 6293
San Diego, CA 92101-8893
5 Telephone: (619) 546-7654
Facsimile: (619) 546-7751
6 Email: dianne.schweiner@usdoj.gov

7 Attorneys for Defendant
UNITED STATES OF AMERICA
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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
12

13 THE ESTATE OF VALERIA
TACHIQUIN ALVARADO, *et al.*,

14 Plaintiffs,

15 vs.

16 JUSTIN CRAIG TACKETT, *et al.*,

17 Defendants.
18
19

Case No.: 13cv1202-W (JMA)

MOTION TO STRIKE PLAINTIFFS'
UNAUTHORIZED 38-PAGE
SUR-REPLY [ECF NO. 143] FILED IN
CONNECTION WITH DEFENDANT
UNITED STATES' MOTION FOR
SUMMARY JUDGMENT

HRG DATE: March 5, 2018

CTRM: 3C (Schwartz)
JUDGE: Hon. Thomas J. Whelan

20
21 Defendant UNITED STATES respectfully submits the following motion to strike
22 the 38-page Sur-reply that Plaintiffs' counsel filed this afternoon in connection with
23 Defendant's pending, and fully briefed, motion for summary judgment.

24 **I.**

25 **PROCEDURAL HISTORY**

26 Defendant UNITED STATES filed its motion for summary judgment on
27 December 21, 2017. (ECF No. 124). The Court originally scheduled the hearing date for
28 the motion for February 5, 2018, giving Plaintiffs a month to oppose the motion (until

1 January 22nd). However, Plaintiffs requested a continuance of their opposition brief
2 deadline, asking that they be allowed an additional two weeks to file their opposition on
3 February 6th, instead of January 22nd. Defendants did not oppose Plaintiffs' request and
4 agreed to the filing of a joint motion. (ECF No. 125). The Court subsequently granted
5 Plaintiffs' request for additional time and therefore Plaintiffs had six weeks to research,
6 prepare and file their opposition brief. (ECF No. 126).

7 On the evening their opposition was due, Plaintiffs filed a 40-page opposition brief
8 in violation of the 25-page limit for summary judgment motions. Rather than requesting
9 additional pages from the Court in advance, as required, and rather than alert defense
10 counsel to their plans, Plaintiffs simply filed their 40-page opposition brief
11 simultaneously with an Ex Parte Application to file the additional pages. Plaintiffs did
12 the same with respect to their opposition to Defendant Justin Tackett's motion for
13 summary judgment, i.e. file excessive pages and then seek permission from the Court
14 after-the-fact.

15 On February 15, 2018, the Court issued an Order granting the additional 15-pages
16 to Plaintiffs with respect to the motion filed by the United States, and granting Plaintiffs
17 additional pages with respect to Justin Tackett's motion. (ECF No. 136). But the Court
18 noted in its Order that Plaintiffs' briefs were "noncompliant" and that they "sought leave
19 of Court to deviate from the page limits of this district on a retroactive basis." *Id.* The
20 Court further noted that:

21 Despite Judge Whelan's Chambers Rule 5(a)'s requirement that "All ex
22 parte applications shall be accompanied by a declaration from counsel
23 documenting (1) efforts to contact opposing counsel, (2) counsel's meet and
24 confer efforts and (3) opposing counsel's position regarding the ex parte
application[.]" no efforts at a meet-and-confer process or any informal
resolution are evident from Plaintiffs' applications. *Id.*

25 Once again, Plaintiffs have now filed a second 38-page opposition brief, without
26 seeking leave of Court, and without any notice or warning to defense counsel. Although
27 defense counsel has not had a chance to fully review or digest Plaintiffs' Sur-Reply filed
28 late this afternoon, quickly skimming the document reveals that there is nothing

1 contained therein that could not have been mentioned or raised in Plaintiffs' initial 40-
 2 page opposition brief. And in fact, most of the information *was* mentioned in Plaintiffs'
 3 prior brief, and is simply duplicative or repetitive (for instance, a continued re-hashing of
 4 events that occurred during Agent Tackett's tenure at Imperial County Sheriff's
 5 Department).

6 There were no new legal arguments and no new facts raised in Defendant's Reply
 7 brief filed earlier this week. Rather, Defendant only responded to the case law cited in
 8 Plaintiffs' initial opposition, and re-affirmed the undisputed issues raised in Defendant's
 9 moving papers. Thus, it appears that Plaintiffs are simply unhappy with the state of their
 10 initial 40-page opposition brief, and have taken the liberty of filing a new one after
 11 having the opportunity to read and review Defendant's Reply brief. This is so despite the
 12 fact that Sur-replies are not allowed without leave of court. *See Banga v. First USA, NA*,
 13 29 F. Supp. 3d 1270 (N.D. Cal. 2014) (court finding that "granting Plaintiff leave to file a
 14 sur-reply is not warranted....[Defendant] did not raise a new legal argument or present
 15 new evidence in its reply brief....Accordingly, Plaintiff's motion for leave to file a sur-
 16 reply is DENIED"); *Forte v. County of Merced*, 2012 U.S. Dist. LEXIS 3529, 2012 WL
 17 94332 (E.D. Cal. 2012) (motion to file sur-reply to the reply denied as without merit);
 18 *Singh v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 2121, 2014 WL
 19 67254 (E.D. Cal. 2014) (holding "there is no provision in the Court's Local Rules
 20 permitting Plaintiff to file a sur-reply....To the extent Plaintiff's request for leave to file
 21 contains the sur-reply he wishes the Court to consider, his request should be DENIED
 22 and the sur-reply should be STRICKEN"); *Garces v. Degadeo*, 2008 U.S. Dist. LEXIS
 23 36603, 2008 WL 1970654, *1 (E.D. Cal. 2008) (holding because a party may not file a
 24 sur-reply without leave of court and plaintiff never obtained such leave, the Court has the
 25 authority to strike or disregard the sur-reply); *Pfizer v. Beneficial California, Inc.*, 2010
 26 U.S. Dist. LEXIS 82796, 2010 WL 3220122, *3 (E.D. Cal. 2010) (court striking Sur-
 27 reply reasoning that "if plaintiff wished to file a surreply . . . , it was incumbent upon her
 28 to do so in compliance with Local Rules and the Federal Rules of Civil Procedure").

Defendant notes that this is a regular pattern practiced by the Law Offices of Iredale & Yoo wherein they consistently file opposition briefs in excess of the required page limitations, along with an after-the-fact ex parte application requesting leave of court after they have already violated the rule and filed the excess pages. This practice puts both the Court and opposing counsel in a bind each time, as the filings have already occurred, are already docketed in the record, and they require additional time and resources for the Court and counsel to respond. Although it is evident that Plaintiffs' counsel lives by the motto that it is "easier to request forgiveness later than to ask for permission in advance," their continual disregard for the Court's rules and deadlines with respect to page limits and ex parte applications is prejudicial to the defense.

Not all motions for summary judgment warrant 80-page opposition briefs filed by Iredale & Yoo, as opposed to the normal 25-page limit, and this case is a perfect example of one that does not warrant such a response.¹ The issues raised in the United States' motion for summary judgment are purely legal issues and an 80-page opposition is unnecessary and prejudicial. For these reasons, Defendant moves to strike from the docket Plaintiffs' second 38-page opposition (aka Sur-reply) and requests that the Court rule on the pleadings as fully briefed earlier this week.

II.

WELL-ESTABLISHED AUTHORITY ALLOWS THE COURT TO STRIKE PLAINTIFFS' SUR-REPLY

Civil Local Rule 7.1(h) provides "Briefs or memoranda in support of or in opposition to all motions noticed for the same motion day must not exceed a total of

¹ Plaintiffs also mislead this Court by labeling their Sur-reply as a "Notice of Supplemental Authority," even though such pleadings are meant for instances where new case law has been issued by higher-level Courts after the filing of a particular motion which directly alters the issues raised in the motion. No new or relevant law relating to this motion has been issued by any Court since the filing of Plaintiffs' opposition brief on February 6, 2018, nor have Plaintiffs cited to any new authority in their 38-page Sur-reply.

1 twenty-five (25) pages in length, per party, for all such motions without leave of the
 2 judge who will hear the motion.” *Id.* Additionally, this Court’s initial Scheduling Order
 3 in this case provided:

4 Briefs or memoranda in support of or in opposition to any pending motion
 5 shall not exceed twenty-five (25) pages in length without leave of the judge
 6 who will hear the motion. Pursuant to Local Rule 7.1.f.3.c, **if an opposing**
 7 **party fails to file opposition papers in the time and manner required by**
 8 **Local Rule 7.1.e.2, that failure may constitute a consent to the granting**
 9 **of a motion or other request for ruling by the Court. . . .** The dates and
 10 times set forth herein will not be modified except for good cause shown.

11 *See* ECF No. 43, ¶¶ 7, 8, and 20 (emphasis in original). *See also* ECF No. 119, ¶¶ 10 and
 12 21, Second Scheduling Order confirming same. Here, Plaintiffs have filed a total of 80-
 13 pages without leave of court, instead of the allotted 25-page limit.

14 Moreover, pursuant to Federal Rule of Civil Procedure 12(f), “the court may strike
 15 from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” The
 16 Court may do so on its own, or on motion made by a party. *Id.* As explained above,
 17 Plaintiffs’ second 38-page brief is nothing more than a second opposition brief which
 18 contains redundant material that could have been raised (or was raised) in their first
 19 opposition filed on February 6, 2018. There is no new law issued by any Court since
 20 their first opposition brief was filed, and there are no new facts pertinent to this shooting
 21 that occurred in September 2012. Plaintiffs’ counsel’s attempt to bombard opposing
 22 counsel with 38-pages of new briefing, without good cause, should be rejected.

23 For the foregoing reasons, Defendant respectfully requests that the Court strike
 24 ECF No. 143 from the docket in this case, and that the Court not consider this untimely,
 25 unauthorized, and prejudicial filing in connection with Defendant’s pending and fully
 26 briefed motion for summary judgment.

27 DATED: February 23, 2018

ADAM BRAVERMAN
 United States Attorney

s/ Dianne M. Schweiner
 DIANNE M. SCHWEINER
 Assistant United States Attorneys
 Attorneys for Defendant
 UNITED STATES OF AMERICA